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No. 85-1177

In the Supreme Court of the United States

OCTOBER TERM, 1985

WALLACE MERRELL MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that his conviction for the knowing receipt of child pornography through the mail is invalid because Congress did not intend to punish the mere receipt of child pornography and that in any event his conviction violates his constitutional right to privacy.

1. Petitioner was convicted on his conditional guilty plea in the United States District Court for the Middle District of Alabama on one count of knowingly receiving child pornography through the mail in violation of 18 U.S.C. 2252(a)(2). The court sentenced petitioner to the maximum period authorized by law, ten years, pending a special study pursuant to 18 U.S.C. 4205(c). The court of appeals affirmed (Pet. App. A1-A8).

Petitioner ordered a booklet from Europe depicting minors engaged in sexually explicit conduct. He received the booklet in his post office box in Montgomery, Alabama, and took it to his home where it remained until seized by federal agents acting pursuant to a search warrant. There was no evidence that petitioner had any intent to distribute, sell, or trade the booklet (Pet. App. A2). He was indicted on five counts of knowingly receiving child pornography through the mail. Petitioner moved to dismiss the indictment on two grounds. First, he argued that the statute was not meant to apply to someone who receives child pornography through the mail not intending to distribute it. Second, he argued that if the statute did apply to him, it violated his right to privacy and was unconstitutional. The district court denied the motion and petitioner then entered a conditional guilty plea to one count of the indictment, reserving the right to appeal the denial of his motion to dismiss.

2. The court of appeals affirmed, rejecting both petitioner's statutory interpretation argument and his claim of unconstitutionality. Section 2252, as amended by the Child Protection Act of 1984, Pub. L. No. 98-292, § 4, 98 Stat. 204, provides that "(a) Any person who * * * (2) knowingly receives * * * any visual depiction * * * through the mails, if (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct," is subject to ten years' imprisonment. Prior to 1984, the statute required proof that the material was received through the mail "for the purpose of sale or distribution for sale" (18 U.S.C. 2252(a)(2)), but that commercial purpose requirement was eliminated by the Child Protection Act of 1984. The court of appeals held that the statute as amended unambiguously applies to those who knowingly receive child pornography through the mail whether or not they intend to distribute it (Pet. App. A3-A5). The court examined the Act's legislative

history and found no clearly expressed legislative intent that undercut the statute's plain language (*id.* at A5). Therefore, the court determined that petitioner's conduct was not exempted from the reach of the Act.

The court of appeals also rejected petitioner's contention, based on *Stanley* .v. *Georgia*, 394 U.S. 557 (1969), that the statute as applied to him violated his constitutional right to privacy (Pet. App. A5-A8). The court concluded that subsequent decisions of this Court foreclose petitioner's argument that he has a right to receive child pornography as long as he takes it to his home for strictly personal use. The court noted (*id.* at A6) that in *United States* v. *Reidel*, 402 U.S. 351, 355-356 (1971), the Court overturned the dismissal of an indictment charging use of the mails for the delivery of obscene materials in violation of 18 U.S.C. 1461 and expressly rejected the lower court's argument that if under *Stanley* a person has a right to possess obscenity then someone must have the right to deliver it to him. And in *United States* v. *Orito*, 413 U.S. 139, 141-142 (1973) (footnote omitted), the court of appeals noted (Pet. App. A7), this Court held that its prior decisions "negate the idea that some zone of constitutionally protected privacy follows [obscene] material when it is moved outside the home area protected by *Stanley*." The court of appeals noted that petitioner "was charged with, and pled guilty to, a crime that occurred before the material ever reached his home," so that *Stanley* did not apply (Pet. App. A7).

3. Petitioner contends that review is warranted because the court of appeals erred in rejecting his constitutional argument. He also argues that the court of appeals erred in holding that Section 2252 applies to a person who receives child pornography through the mail. Petitioner is wrong on both points. Congress clearly intended Section 2252 to apply to petitioner's activities, and this Court's post-*Stanley* decisions make clear that petitioner's right to privacy was not violated by the application of Section 2252 to him.

Since no decision of any other court of appeals conflicts with the decision below, further review by this Court is unwarranted.

a. There is no merit to petitioner's statutory argument. He contends that the purpose of the 1984 amendment eliminating the commercial purpose requirement from Section 2252 was to enable Section 2252 to reach persons who exchange child pornography as well as sellers and distributors (Pet. 8). Petitioner argues that since there is no evidence that he intended to exchange the material he received the Act does not apply to him (*ibid.*).

The court of appeals correctly rejected petitioner's contention. As the court stated: "Congress amended [Section 2252] in 1984 to delete the 'commercial purpose' language from [the statute]. As amended, the statute no longer proscribes 'knowingly receiv[ing] for the purpose of sale or distribution for sale . . . any obscene visual or print medium that has been . . . mailed . . .,' but rather forbids 'knowingly receiv[ing] any visual depiction that has been . . . mailed.' " Pet. App. A3 (footnote omitted). Thus, the statute now unambiguously covers the knowing receipt of child pornography through the mails. "If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.' " *United States* v. *Turkette*, 452 U.S. 576, 580 (1981), quoting *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Since the statute here is "patently unambiguous," the court below examined the legislative history in order to discern whether the plain meaning of the statute was called into question (Pet. App. A4). The court found no "clearly expressed legislative intent to the contrary" and petitioner has pointed to nothing in the legislative history that undercuts the statute's plain meaning. Therefore petitioner's conduct is not exempt from the reach of the Act.

The committee reports did state, as a reason for deleting the commercial purpose requirement from Section 2252, that some persons exchange child pornography rather than sell it, as petitioner notes (Pet. 8). But that does not support petitioner's argument. Had Congress intended only to proscribe the exchange of child pornography it could have added language making exchange a crime rather than deleting the commercial purpose requirement from Section 2252. As the court of appeals recognized, Congress amended Section 2252 to delete the commercial purpose requirement in order to dry up the distribution network in child pornography because " 'the harm to the child exists whether or not those who initiate or carry out the schemes are motivated by profit' "(Pet. App. A4, quoting H.R. Rep. 98-536, 94th Cong., 1st Sess. 2-3 (1983)). It makes sense that Congress proscribed the receipt of child pornography in the mails as well as its exchange, because "the industry would disintegrate absent willing buyers" (Pet. App. A5).

b. Nor is there merit to petitioner's constitutional argument. This Court held in *Stanley* that the mere possession of obscene material in the privacy of one's home cannot constitutionally be made a crime. 394 U.S. at 568. The court of appeals correctly noted that this Court has steadfastly refused to enlarge the holding of *Stanley* beyond the right to possess materials in the privacy of one's own home (Pet. App. A6). The Court has held that its decision in *Stanley* did not create a right to distribute or sell obscene material (*United States* v. *Reidel, supra*); or to import obscenity (*United States* v. *Thirty-Seven Photographs*, 402 U.S. 363 (1971)); or to transport it interstate (*United States* v. *Orito, supra*). And in *United States* v. *12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123, 125 (1973) (footnote omitted), the Court squarely held that "the United States may constitutionally prohibit importation of obscene material which the importer claims is for private, personal use and possession

only." The Court stated in that case that "[t]he Constitution does not compel * * * an exception for private use of obscene material" outside the privacy of one's home (*id.* at 129). Section 2252 does not make the possession of child pornography in the home a crime, but instead prohibits the receipt of child pornography through the mails or through interstate or foreign commerce. Therefore, it is not invalid under this Court's decision in *Stanley*.

Petitioner argues (Pet. 6) that the receipt of the material in his post office box is inextricably intertwined with his right to read the material privately in his own home and that therefore his conviction violates his right to privacy as articulated in *Stanley*. That argument is no more than a restatement of the arguments that the right to possess obscenity necessitates the recognition of a right to sell, import, or transport obscenity, which this Court has repeatedly rejected. There is no right of access to obscene materials, and such materials enjoy no zone of constitutionally protected privacy "outside the home area protected by *Stanley*." *Orito*, 413 U.S. at 141 (footnote omitted). As the court of appeals stated, since petitioner pleaded guilty to "a crime that occurred before the material ever reached his home[,] [t]he fact that the booklet ultimately came to rest in [petitioner's] home does not retroactively insulate [him] from prosecution" for receiving the booklet in his post office box (Pet. App. A7). In light of this Court's emphasis on the limited nature of the privacy right created in *Stanley*, the court below correctly refused to expand the holding in *Stanley* to create a right "to knowingly receive child pornography through the mail" (Pet. App. A8).

Furthermore, it would make no sense to expand the holding in *Stanley* in a case involving child pornography. Congress has not only banned child pornography from the channels of commerce, it has proscribed its production as well (18 U.S.C. 2251). Congress did so because it concluded, as the court of appeals noted (Pet. App. A4), that the

production of child pornography harms children. This Court has also recognized that the production of child pornography is harmful (*New York* v. *Ferber*, 458 U.S. 747, 758 & n.9 (1982)). If there is any reason to extend the Court's holding in *Stanley*, the arguments supporting such an extension are least persuasive in a case involving child pornography, since the arguments supporting the complete elimination of that form of obscenity are most compelling.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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